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APR 22 1991

Federal Communications Commission  
Office of the Secretary

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April 22, 1991

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: MMB File No. 910221TA; Petition for Declaratory  
Ruling on Security Interests in Broadcast Licenses

Dear Ms. Searcy:

Transmitted herewith for filing with the Commission on behalf of the First National Bank of Boston are an original and four copies of its "Comments" on the above-referenced Petition for Declaratory Ruling.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

*John T. Scott, III*

John T. Scott, III

Enclosures

cc: Ms. Kathleen Ham  
Legal Branch, Policy and Rules Division

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APR 22 1991

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In Re )  
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Petition for Declaratory Ruling That )  
Lenders May Take a Limited Security )  
Interest in an FCC License )

MMB File No. 910221TA

COMMENTS OF THE FIRST NATIONAL BANK OF BOSTON

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Dated: April 22, 1991

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COMMENTS OF THE FIRST NATIONAL BANK OF BOSTON

The First National Bank of Boston ("the Bank"), by its attorneys, hereby comments on the "Petition for Declaratory Ruling" ("Petition"), filed February 21, 1991, by the law firm of Hogan & Hartson.

I. SUMMARY

The Bank supports the Petition, and joins its request that the Commission acknowledge the right of broadcast licensees to grant security interests in their licenses, so long as such interests are subject to the requirements of the Communications Act of 1934, as amended ("the Act").

The Petition is correct that the Commission's past statements concerning security interests in licenses are dicta and set forth a position which is not required by the Act. The Commission is free to depart from those statements and declare that security interests which prevent the secured party from exercising any

control over the station or the license without prior Commission consent are permissible.

It is also sound policy for the Commission to issue the declaratory ruling the Petition requests. First, its prior statements have led to the perception that the Commission intends to be involved in matters of commercial law. It is fundamental Commission policy to stay out of legal matters, such as private contractual relationships, that do not impinge on the Act or its Rules. Removing the perception that the Commission is hostile to properly limited security interests would be entirely consistent with that policy. Second, the Bank has been actively involved in lending to radio and television broadcast licensees for many years. In its view the Commission's statements on security interests have created confusion and uncertainty that have distorted the lending "market" and impaired the broadcast industry's ability to compete on a "level playing field" for lending dollars with other industries, including other media. By permitting limited security interests, the Commission can eliminate the uncertainty and distortion in the market, while fully protecting all of the interests Congress has charged it with protecting.

II. THE COMMUNICATIONS ACT DOES NOT PROHIBIT  
SECURITY INTERESTS THAT ARE SUBJECT TO  
THE REQUIREMENTS OF THE ACT.

The Petition reviews the language and history of the Act to demonstrate why the Act does not preclude all security interests in licenses. Two salient points need to be emphasized. First,

the Act's language, as amplified by its legislative history, makes clear that Congress sought to prevent licensees from holding any property interests in the particular frequency to which they were licensed to operate. It did not address a licensee's interests in the license itself or the licensee's right to use those interests as collateral. Second, Congress intended to prevent licensees from asserting ownership interests that would frustrate the Commission's plenary control of the licensing process. It did not prohibit any property right in a license as between the licensee and third parties as long as the licensee remains in control, unless and until the Commission approves transferring control. The ruling the Petition requests can be granted without impinging on the Act's goals.

The Bank adds the following comments in support of the Petition's legal analysis. First, the language of the Act affirmatively implies that licenses do create rights that can appropriately be encumbered as long as the Act's requirements are met. Section 301 states that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license" (emphasis added), thus indicating that the terms of a license themselves create rights. Thus, for example, the market for station acquisitions assigns a substantial value to a station as a going concern, but without a license, there is no right to operate. There is nothing in the Act that suggests that the value represented by the rights inherent in a station license cannot be used to secure a loan to the licensee, so long as the security interest complies with the Act's requirements. Such compliance is

assured if it is clear that the interest cannot lead to control of the station, or transfer of the license, without prior Commission approval. A security interest limited in this way does not constrain the licensee's ability to operate as a public trustee or to control station operation, and thus does not implicate the Act.

Second, the Commission does not need to reverse any precedent in order to issue the ruling requested by the Petition. The Commission's policy against security interests in broadcast licenses was derived from dicta in cases that did not present, let alone decide, the issue of whether a lender who was not the previous licensee could hold such an interest. In addition, the Commission's casual references to security interests presumed that there was some statutory basis for the policy, but did not adopt an interpretation of any provision of the Act that would compel this policy. A reading of Sections 301, 303, 304 or 310(d) of the Act reveals no language, express or implied, that prevents licensees from granting security interests in the licenses.

Third, the Uniform Commercial Code ("UCC"), the law that governs security interests in all types of personal property, is consistent with Commission policy. Under the express provisions of the UCC, federal laws such as the Act's prohibition against transfer of control or transfer of a license without prior Commission approval supersede any conflicting provisions of the UCC. UCC § 9-104(a). Thus, for instance, the Act supersedes the right a secured lender would otherwise have to operate the borrower's business and its right to transfer the borrower's interest in collateral to a buyer at a foreclosure sale. The

Act's provisions, however, are fully consistent with the secured lender's right under the UCC to enforce its security interest in a judicial proceeding, and its right to priority over other creditors in the proceeds of the sale of a station that has been approved by the Commission.

The Commission is free to declare that security interests in licenses may be granted provided that the requirements of the Act are met by both licensee and lender. While the Act bars a licensee (or a secured party) from claiming any rights other than what the license grants, it nowhere stops a licensee from granting a security interest in those rights as it could in other assets of value.

III. THERE ARE STRONG POLICY REASONS WHY THE COMMISSION SHOULD DECLARE THAT LIMITED SECURITY INTERESTS ARE PERMISSIBLE.

The Petition argues that the Commission's perceived hostility toward security interests in licenses has made station financing more difficult to obtain in the weak lending market today. While the Bank agrees that this is one reason why the requested ruling should be granted, there are two more fundamental grounds for the Commission to declare that security interests in compliance with the Act may be granted.



A. Recognizing Security Interests Will Be Consistent  
With the Commission's Policy Not to Intrude in  
Areas Outside its Jurisdiction and Expertise.

A security interest is a private contractual relationship between a borrower and a lender which gives each party certain rights in the secured assets, and gives the lender rights vis-a-vis other creditors. Those rights are construed and enforced by state and federal courts in various types of actions, including receivership and bankruptcy proceedings. Courts have developed a comprehensive body of law to resolve disputes and deal with these private arrangements. Those arrangements, in and of themselves, do not involve a licensee's compliance with the Act or its public service obligations. The Commission should not regulate legal relationships that implicate no provisions or policies of the Act. The courts, not the Commission, are best equipped to deal with the issues presented by security interests.

The Commission's broadly worded statements about security interests in licenses, as construed by courts, have effectively taken the Commission into the area of commercial law. This has affected courts' construction and enforcement of financing arrangements long used in commercial practice. That is a situation that, in other contexts, the Commission has avoided. The Commission has repeatedly stated that it will not intrude into areas of law outside its statutory responsibility or expertise. It will not, for example, determine whether a station sales agreement has been breached, or whether a licensee has violated

the antitrust laws<sup>1/</sup>. Instead it will leave such issues to courts and other agencies. This policy is sound and provides a strong basis for making clear that the Commission does not prohibit security interests in licenses per se.

To the extent that security interests implicate the Act or the Commission's Rules, the Commission has an interest to protect. If, for example, a security interest were to permit a lender to seize a license or operate a station, without demonstrating it is qualified to be a licensee and obtaining prior Commission approval, that interest would intrude on the Commission's jurisdiction and violate the Act. Security interests, however, not only can be but are created to comply with all relevant Commission rules. As noted above, the commercial law that governs security interests acknowledges, and is subject to, other laws such as the Communications Act. A secured party thus cannot use its security interest to seize the license or operate the station without Commission approval.

Security interests also establish priority among creditors. This is clearly beyond the Commission's interest and jurisdiction. No Commission policies are affected by a court's giving effect to priorities among creditors. Yet the Commission's current position, as construed by courts faced with this issue, has

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<sup>1/</sup> See, e.g., Viacom Intl. Inc., 63 R.R.2d 290 (1987) (antitrust allegation will not be considered); Southern Illinois Broadcasting Corp., 45 R.R.2d 1280 (1979) (breach of contract claim must be adjudicated in a court); Broadcast Call Sign Assignments, 54 R.R.2d 1492 (1983) (claims of trademark infringement outside Commission's responsibility).

undermined the effectiveness of the security interest mechanism for this well-established and justifiable purpose.

It is not enough for the Commission to disclaim any intention to have its decisions affect the law of security interests, bankruptcy and receivership. They already have done so. The Commission's statements (despite being dicta) have been interpreted as setting forth a formal position that no security interests may be taken in licenses. The decisions in the Stephens and Oklahoma cases expressly depend on the perception that the Commission has spoken on this issue. The Commission needs to narrowly circumscribe the language of its decisions so it is not perceived as impinging on the proper exercise by courts of their own jurisdiction on non-Commission matters. The best way to do so is to declare that security interests in licenses do not violate the Act or Commission policy as long as they do not permit any transfer of control of a license or station operation to the secured party until Commission consent has been obtained.

The Commission has an undeniable responsibility to ensure that its licensees serve the public interest in their communities, and to review and approve new licensees. But the full extent of this responsibility can be exercised without a flat prohibition against security interests in licenses. We would agree with the Commission's statement in Radio KDAN that a station license is not mortgageable chattel "in the ordinary commercial sense." There are indeed special considerations arising from the Commission's jurisdiction and its right to approve license transfers. Those considerations can, however, be completely accommodated by a rule

that requires prior FCC approval for the transfer of a license, while still allowing the attachment of a security interest for commercial law purposes. Regulatory interest have been accommodated in other areas (for example, liquor licenses and airport landing rights discussed in the Petition), where the courts have been able to exercise their jurisdiction without being improperly constrained by the licensing agency, or impinging on its authority.

B. Recognizing Security Interests Will Eliminate Uncertainty and Distortion in the Lending Market.

The Commission has adhered to an equally fundamental policy of avoiding unnecessary interference in the broadcast market as long as the market does not produce results antithetical to Commission rules<sup>2/</sup>. That policy, like its policy of staying out of legal matters outside its expertise, favors permitting limited security interests in broadcast licenses. The Commission's position, particularly as interpreted by several courts in bankruptcy cases, has created much uncertainty. Uncertainty is bad, bad for station borrowers as well as for lenders. In many cases it has distorted lending practices, causing the market to develop awkward and unnecessarily complex approaches toward lending. For example, some agreements grant a security interest

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<sup>2/</sup> See, e.g., Elimination of Unnecessary Broadcast Regulation, 54 R.R.2d 705; 54 R.R.2d 1043 (1983) (deleting rules and policies that may impede competitive functioning of the market by imposing restraints not required by act); Deregulation of Radio, 49 R.R.2d 1 (1981) (subsequent history omitted) (Commission can rely on market forces to ensure public interest benefits).

in a license "to the extent permitted by law," which is unsatisfactory from the perspective of both lender and borrower because it simply postpones, and leaves to litigation, any determination of what rights the parties in fact have. The uncertainty has also led in many cases to needlessly complicated security arrangements which would not be considered were the borrower's rights in the license clearly available as collateral.

The broadcast lending market is thus more difficult for lenders and borrowers, and will remain so even after the overall lending market improves, unless the Commission acts favorably on the Petition. This is a burden that is not shared by other businesses, including those that compete with broadcasting. The lending market for the cable industry, the print media, or other service businesses does not labor under the constraints created by the Commission's position. The Commission has often spoken of its belief in the public interest inherent in a "level playing field" for various competing businesses. There needs to be a level playing field for broadcasters in borrowing needed capital, just as in operating their stations. Removing the perception that the Commission prohibits properly limited security interests in licenses would allow the lending market to function free of this problem but consistent with the interests the Commission must safeguard.

IV. CONCLUSION

For the reasons set forth above and in the Petition, the Bank requests that the Commission declare that security interests may be granted in licenses if they leave control of the license with the licensee until the Commission has approved an assignment of license to a new licensee.

Respectfully submitted,

THE FIRST NATIONAL BANK OF BOSTON

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Dated: April 22, 1991

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of April, 1991, caused a copy of the foregoing "Comments" to be sent by first-class mail, postage prepaid, to the following:

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